IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

COMPUSPA, INC.	:	
v.	:	Civil Action No. DKC 2002-0507
INTERNATIONAL BUSINESS MACHINES CORPORATION	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this breach of contract and tortious interference with contractual relations case are the motions (1) by Plaintiff CompuSpa, Inc. for leave to file an amended complaint; (2) by Defendant International Business Machines Corporation (IBM) for leave to file a surreply; and (2) by Defendant for summary judgment. The issues have been fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, the court will (1) deny the motion for leave to file an amended complaint, (2) deny the notion for leave to file a surreply, and (3) grant the motion for summary judgment.

I. Background

The following are facts uncontroverted or viewed in the light most favorable to Plaintiff CompuSpa, Inc. On April 10, 2000, Plaintiff and Defendant International Business Machines Corporation (IBM) formed a subcontract, under which Plaintiff

agreed to provide Defendant with computer systems administrators, network administrators and software engineers in support of a contract Defendant held with the Internal Revenue Service (IRS). The Subcontract required Defendant to issue Release Orders to engage Plaintiff for the provision of services. On May 1, 2000, Defendant engaged Plaintiff by issuing Release Order #2 (RO #2) for five technician employees (Austin Technicians) to work on the project in Austin, Texas (Austin Project). Defendant terminated RO #2 on June 2, 2000, claiming that Plaintiff had breached the Subcontract. By June 3, 2000, all five of the Austin Technicians had left the employ of Plaintiff and soon after joined Cardinal Systems Group, a competitor, which ultimately received the subcontract to service the Austin Project.[1]

On January 10, 2002, Plaintiff filed a three-count complaint in Maryland state court against Defendant, alleging breach of contract, tortious interference with contractual relations, and breach of implied covenants of good faith and fair dealing. Defendant removed the case to this court and subsequently filed a motion to dismiss the complaint for failure to state a claim. On September 3, 2002, the court granted in part and denied in

[1] For a more detailed factual background, *see CompuSpa, Inc. v. International Business Machines Corp.*, 228 F.Supp.2d 613 (D.Md. 2002).

part Defendant's motion, dismissing the breach of implied covenants claim but finding that Plaintiff had stated claims sufficiently on the remaining two counts.[2]

The court now is presented with three new motions. On September 12, 2003, Plaintiff filed a motion for leave to file an amended complaint. Defendant opposed the motion and, on October 10, 2003, moved for leave to file a surreply in connection with it. Plaintiff opposes the motion to file a surreply. Finally, on October 20, 2003, Defendant filed a motion for summary judgment. The court will address the motions in turn.

II. Plaintiff's Motion for Leave to Amend

Plaintiff filed the motion for leave to amend its complaint on September 12, 2003. The court previously had set a deadline in the scheduling order of April 7, 2003, by which all motions for leave to amend pleadings were to be filed. *See* Paper 16. Plaintiff's motion for leave to amend after the deadline triggers both Fed.R.Civ.P. 15(a) governing amendments to pleadings and Fed.R.Civ.P. 16(b) governing modification of a scheduling order. The language of the Rules are at odds. Rule 15(a) provides, in pertinent part, that leave to amend "shall be

[2] The court dismissed two of the three allegations under the breach of contract claim.

freely given when justice so requires." Rule 16(b), on the other hand, states that a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge." *See* 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1522.1 (2d ed. 1990) ("The scheduling order and the timetable it establishes will be binding. . . . In the absence of some showing of why an extension is warranted, the scheduling order shall control").

Although neither the Fourth Circuit nor the Supreme Court has addressed directly the dynamic between these two rules at this procedural juncture, a majority of circuits "have held that Rule 16(b)'s 'good cause' standard, rather than Rule 15(a)'s 'freely given' standard, governs motions to amend filed after scheduling order deadlines." *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 154-55 (1st Cir. 2004) (collecting cases). To that end, Plaintiff first must satisfy the good cause standard of Rule 16(b) and, if successful, then must pass the tests for amendment under Rule 15(a). *See Rassoull v. Maximus, Inc.*, 209 F.R.D. 372, 373 (D.Md. 2002). The inquiry under the "good cause" standard of Rule 16(b) primarily "focuses on the timeliness of the amendment and the reasons for its tardy submission" and, in particular, on "the diligence of the movant." *Id.* at 374.

In the instant case, Plaintiff seeks to add new claims for defamation and for unfair and deceptive trade practices. Plaintiff states that it ascertained the basis for these claims from "new evidence only just discovered," specifically the deposition testimony of a third-party competitor on August 19, 2003. Paper 29 at 2. It was only then, Plaintiff contends, that it "first learned" that an employee of Defendant "made false and defamatory statements" to the deponent. *Id.* at 1-2.

As part of the tortious interference with contractual relations claim, in its original complaint, Plaintiff had alleged: "On or about May 25, 2000, IBM falsely and defamatorily told CompuSpa Employees that the State of Maryland had seized all of CompuSpa's assets and that the company would not survive financially." Paper 1 at ¶ 69. Plaintiff also alleged that Defendant "published these same false and defamatory statements to CompuSpa's competitors." *Id.* at ¶70.

In its proposed amended complaint, Plaintiff alleges in the defamation count that "on or about May 24, 2000, IBM communicated false and *per se* defamatory statements to at least one of CompuSpa's competitors," namely that Plaintiff had "ongoing problems with meeting its payroll" and "was unable to operate under its current name." Paper 29 at ¶ 70. Additionally, Plaintiff alleges that Defendant "engaged in

unfair and deceptive trade practices," under the Maryland Consumer Protection Act, "when it disparaged CompuSpa's business by making false and misleading representations of material fact to third parties." *Id.* at ¶ 77. Plaintiff asserts that it did not possess sufficient factual knowledge and information "to satisfy the very different elements of an actual cause of action for defamation." Paper 33 at 3. Plaintiff does not offer an explanation for the delay in adding the claim for unfair and deceptive trade practices.

The substance of both proposed additional claims essentially mirrors the allegations––*i.e.,* false and defamatory statements made by Defendant to a competitor of Plaintiff, in late May 2000––contained in Plaintiff's original complaint. Indeed, there exists little if any appreciable difference between them. Therefore, as Defendant correctly argues, Plaintiff knew or should have known that it had a potential cause of action for defamation or unfair and deceptive trade practices at the time it filed the original complaint. Any arguments by Plaintiff to the contrary are unavailing. Plaintiff has failed to show good cause for the undue delay in attempting to add these new claims, more than five months after the deadline for amendment of pleadings, especially in light of the prejudice that would inure to Defendant at this late stage. In fact, Plaintiff does not

even address the good cause standard of Rule 16(b), which governs its motion under these circumstances. Accordingly, Plaintiff's motion for leave to file an amended complaint will be denied.[3]

III. Defendant's Motion for Leave to File a Surreply

Defendant has moved to file a surreply in order to counter what it considers "erroneous legal and factual assertions" made by Plaintiff in a reply brief supporting the motion for leave to file an amended complaint. Paper 35 at 1. Unless ordered by the court, surreply memoranda are not permitted to be filed. Local Rule 105.2(a). The court may permit surreplies, however, when the moving party would be unable to challenge matters presented to the court for the first time in the opposing party's reply. *See Khoury v. Meserve*, 268 F.Supp.2d 600, 605 (D.Md. 2003), *aff'd*, 85 Fed.Appx. 960 (4th Cir. 2004) (unpublished disposition). Because the court has denied Plaintiff's motion for leave to file an amended complaint, it need not address whether a surreply by Defendant is justified

[3] Because there exists no good cause for modification of the scheduling order, pursuant to Rule 16(b), the court need not reach the Rule 15(a) analysis. *See Odyssey Travel Center, Inc. v. RO Cruises, Inc.*, 262 F.Supp.2d 618, 632 n.10 (D.Md. 2003).

here. Accordingly, the motion for leave to file a surreply will be denied.

IV. Standard of Review

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1987). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Catawba Indian Tribe of South Carolina v. State of S.C.*, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the

party opposing the motion. *See U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir.), *cert. denied sub nom.*, *Gold v. Panalpina, Inc.*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

V. Defendant's Motion for Summary Judgment

A. Breach of Contract

Plaintiff has alleged that Defendant breached the Subcontract between the two parties by unlawfully terminating RO #2 on June 2, 2000, and denying Plaintiff the opportunity to cure any alleged breach.[4] To maintain an action for breach of contract, under New York law, a plaintiff must prove: "(1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." *First Investors Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998) (quoting *Rexnord Holdings, Inc. v. Bidermann,* 21 F.3d 522, 525 (2d Cir. 1994)). Defendant argues that summary judgment is appropriate on the breach of contract claim, *inter alia*, because Plaintiff cannot sufficiently establish damages from the alleged breach.[5]

On June 12, 2000, the parties executed and signed a final modification of RO #2, which limited Defendant's payment

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[4] Plaintiff's breach of contract claim will be decided under New York law, pursuant to the choice of law provision (¶ 15.3) of the Subcontract. *See CompuSpa*, 228 F.Supp.2d at 619. Unless otherwise stated, all such cited provisions of the Subcontract are contained in Section E.

[5] Alternatively, Defendant contends that its termination of RO #2 was lawful and in compliance with the Subcontract, which provides that Defendant may terminate a release order "with Cause effective immediately or without Cause on thirty (30) days written notice." Paper 37, Ex. 1 at ¶ 4.3. In its notification letter to Plaintiff, Defendant wrote that RO #2 "is immediately Terminated for Cause." Paper 37, Ex. 51.

obligation to the amount due for the hours worked by the Austin Technicians through the date of termination (June 2, 2000). *See* Paper 37, Exs. 23, 55. Defendant paid to Plaintiff the modified sum of $57,192.00, the amount billed by Plaintiff for the services rendered by the Austin Technicians. The modified RO #2 represented the "complete agreement" between the parties as to this Release Order, thereby replacing the first RO #2. Paper 37, Ex. 55.

In a breach of contract action, under New York law, Plaintiff "may seek two distinct categories of damages: (1) 'general' or 'market' damages; and (2) 'special' or 'consequential' damages." *Schonfeld v. Hilliard*, 218 F.3d 164, 175 (2d Cir. 2000). General damages are those damages that arise as "the natural and probable consequence of the breach," *Coastal Power Int'l, Ltd. v. Transcontinental Capital Corp.*, 10 F.Supp.2d 345, 364 (S.D.N.Y. 1998) (internal quotation omitted), *aff'd*, 182 F.3d 163 (2d Cir. 1999), and are measured by "the value of the very performance promised." *Schonfeld*, 218 F.3d at 175 (internal quotation omitted). Special or consequential damages, by contrast, "seek to compensate a plaintiff for additional losses (other than the value of the promised performance) that are incurred as a result of the defendant's breach." *Id.* at 176. These latter damages are recoverable only

if the plaintiff proves that liability for the loss was "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Coastal Power,* 10 F.Supp.2d at 364 (internal quotation omitted); *see also Schonfeld*, 218 F.3d at 177.

In this case, the Subcontract contains a limitation of liability clause, which the court has held previously will be enforced with respect to damages on the breach of contract claim. *See CompuSpa*, 228 F.Supp.2d at 627.[6] The clause provides, in pertinent part, that "in no event will either party be liable to the other in contract or tort otherwise for any lost revenues, lost profits, incidental, indirect, consequential, special or punitive damages." Paper 37, Ex. 1 at ¶ 12.0. It is well settled that "parties to a contract must remain free to allocate risks and shield themselves from liability." *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.*, 63 F.3d 1188, 1195 (2d Cir. 1995).

Plaintiff seeks recovery of out-of-pocket expenses in the amount of $7,300.00. That amount includes (a) a debt of

[6] Under New York law, such valid clauses "limit recovery. . . for breach of contract." *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 60 (2d Cir. 2000).

$6,500.00 owed to PeopleSolv, regarding fixed fee retainer services for recruitment of the Austin Technicians, and (b) $800.00 reportedly incurred in travel expenses by Ainsley Gill, President and CEO of CompuSpa, in connection with the Austin Project. Both of these amounts are, by definition, consequential or special damages–– recovery of which is expressly proscribed by the limitation of liability clause.[7] Therefore, with regard to damages, Plaintiff has failed to produce "admissible evidence demonstrating a genuine issue for trial on the breach of contract claim, and thereby failed to carry [its] burden in opposing summary judgment." *Kader v. Paper Software, Inc.*, 111 F.3d 337, 343 (2d Cir. 1997). Accordingly, Defendant's motion for summary judgment as to the breach of contract claim will be granted.

B. Tortious Interference With Contractual Relations

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[7] Plaintiff refers to the $6,500.00 as "an accrued obligation" and "amounts owing" because Plaintiff in fact has not yet paid this bill to PeopleSolv. Paper 39 at 27. It is axiomatic that to recover these expenses, Plaintiff must actually have spent $6,500 out-of-pocket as payment for the services of PeopleSolv. *See Anchor Fish Corp. v. Torry Harris, Inc.*, 135 F.3d 856, 858 (2d Cir. 1998) ("unimpeached evidence" of testimony by plaintiff's principal "was legally sufficient" to show that plaintiff "had spent $18,000 dollars out-of-pocket"); *F.D.I.C. v. Bernstein*, 786 F.Supp. 170, 179 (E.D.N.Y. 1992) (out-of-pocket expenses "means money coming out of [plaintiffs'] pocket in furtherance of the corporate purpose") (internal quotation omitted). Thus, in any event, Plaintiff may not recover a sum that it never expended.

Plaintiff alleges that Defendant committed tortious interference with contractual relations by communicating "false and defamatory statements" to Plaintiff's employees, the Austin Technicians, "with the intention of inciting" them to leave their jobs in violation of their employment contracts, which required a 30-day written notice before resignation. Paper 1 at ¶ 69. Plaintiff also alleges that Defendant conveyed the same statements to Plaintiff's competitors, encouraged them to hire the Austin Technicians, and provided the competitors with the employees' contact information. According to Plaintiff, this conduct by Defendant caused the Austin Technicians to breach their employment contracts with Plaintiff and join competitor Cardinal, which ultimately received the subcontract to service the Austin Project. Defendant has moved for summary judgment on this claim, contending that it did not tortiously interfere with Plaintiff's contractual relations, but that even if it did, it was legally justified in doing so.

As this court observed previously, it is unclear whether the tortious interference claim constitutes a "dispute arising under or relating to" the Subcontract, such that it is governed by New York law as provided in the choice of law provision or by Texas law as a tort independent from the Subcontract. *See CompuSpa*, 228 F.Supp.2d at 623; Paper 37, Ex. 1 at ¶ 15.3. Therefore, the

court will consider Defendant's summary judgment motion under both New York law and Texas law; however, the elements of the tortious interference claim are fundamentally the same in either state.[8]

To establish a tortious interference with contractual relations claim under New York law, the plaintiff must prove:

> (a) that a valid contract exists; (b) that a "third party" had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff.

Albert v. Loksen, 239 F.3d 256, 274 (2d Cir. 2001) (quoting *Finley v. Giacobbe,* 79 F.3d 1285, 1294 (2d Cir. 1996)); *see also Foster v. Churchill*, 87 N.Y.2d 744, 749-50, 665 N.E.2d 153, 156 (1996). Similarly, Texas law requires proof of these elements to prevail on a tortious interference claim:

> (1) the existence of a contract subject to interference; (2) willful and intentional interference with that contract; (3) the intentional interference was a proximate cause of plaintiff's damage; and (4) actual damage or loss occurred.

Wardlaw v. Inland Container Corp., 76 F.3d 1372, 1375 (5th Cir. 1996); *see also Johnson v. Hosp. Corp. of America*, 95 F.3d 383, 394 (5th Cir. 1996).

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[8] For this reason, the court will cite alternatively to case law from both jurisdictions in the discussion, *infra*.

Defendant offers four arguments in favor of summary judgment on the tortious interference with contractual relations claim: (1) it did not have knowledge of the 30-day notice provision for termination in the employment contracts between Plaintiff and the Austin Technicians; (2) it did not cause these employees to breach their contracts with Plaintiff; (3) Plaintiff has failed to establish damages sufficiently to sustain its claim; and (4) even if Defendant did commit such interference, as alleged, it was legally justified in doing so.

1. Knowledge

Defendant asserts that it lacked knowledge of the 30-day notice provision in the employment contracts between Plaintiff and the Austin Technicians. Knowledge is a prerequisite for a tortious interference with contractual relations claim, but Defendant operates from an erroneous premise in its argument. For a tortious interference claim, knowledge of the contract "need not have been perfect or precise," nor must the third party, as Defendant here, "have been aware of the legal particulars of the contract." *Hidden Brook Air, Inc. v. Thabet Aviation Intn'l Inc.*, 241 F.Supp.2d 246, 279 (S.D.N.Y. 2002) (internal citations omitted). Indeed, it is enough that the allegedly interfering third party "have knowledge of the *existence* of the contract." *Don King Productions, Inc. v.*

Douglas, 742 F.Supp. 741, 775 (S.D.N.Y. 1990) (emphasis in original) (noting that plaintiff not required to prove that defendant had exact knowledge "of the terms and conditions of the contracts in issue").

In the instant case, Plaintiff has produced evidence sufficient to show that Defendant had knowledge of Plaintiff's employment contracts with the Austin Technicians. For instance, Fred Williams, the IBM project manager, stated in his deposition that the Austin Technicians could not simply have left Plaintiff's employ and joined that of Defendant:

> because of their contractual understanding of their relationship with CompuSpa, I understood that they couldn't just walk away from CompuSpa and stay on the site in any capacity. . . . I didn't think it was feasible based on my understanding of the procurement rules and the agreement that they had made with CompuSpa.

Paper 39, Ex. Q at 121-22 (lines 21-22, 1-3, 10-12). Furthermore, James Dabney, one of the Austin Technicians, stated in his affidavit that he contacted Williams to convey his frustration with his employment situation with Plaintiff. According to Dabney: "Mr. Williams expressed sympathy for our situation but said that there was nothing IBM could do, and that we needed to work out our pay issue with CompuSpa." Paper 37, Ex. 15 at ¶ 5.

At minimum, there exists a genuine issue of material fact as to Defendant's knowledge of the employment contracts between Plaintiff and the Austin Technicians. That Defendant may not have known about the 30-day notice provision in the contracts is of no moment. Summary judgment therefore is inappropriate on this ground. *See Hidden Brook Air*, 241 F.Supp.2d at 279-80; *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F.Supp.2d 236, 289-90 (S.D.N.Y. 2002).[9]

2. Causation

Defendant next argues that it did not proximately cause the Austin Technicians to breach their employment contracts with Plaintiff. On the causation element, the "critical inquiry" is whether Plaintiff's employees would have breached their obligations–-by terminating the contracts without the required 30-day written notice–-"without the involvement" of Defendant, the alleged "interfering party." *Antonios A. Alevizopoulos and Assocs., Inc. v. Comcast Int'l Holdings, Inc.* 100 F.Supp.2d 178, 187 (S.D.N.Y. 2000).

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[9] The instant case is distinguishable from *Trionic Assocs., Inc. v. Harris Corp.*, 27 F.Supp.2d 175 (E.D.N.Y. 1998), *aff'd*, 198 F.3d 235 (2d Cir. 1999) (Table), relied on by Defendant, in which the court granted summary judgment on the tortious interference claim where Defendant argued that it was unaware of the contract at issue and Plaintiff "submitted no evidence to the contrary." *Id.* at 185.

Plaintiff alleges that Defendant operated as the "but for" cause of the breaches by: (1) telling its employees that the State of Maryland had seized all of Plaintiff's assets and that Plaintiff was in financial peril, and (2) telling its competitors that Defendant was ceasing to do business with Plaintiff and that they should hire the Austin Technicians to continue working on the project, while providing them with the employees' contact information.

By June 3, 2000, all five of the Austin Technicians had left Plaintiff's employ and soon after began working for Cardinal, which ultimately received the subcontract to service the Austin Project after Defendant terminated RO #2. The crux of Plaintiff's claim is that but for Defendant's provision of the employee contact information to Cardinal, the Austin Technicians would not have quit their jobs with Plaintiff and joined Cardinal. Defendant admits to furnishing the employee contact information to Plaintiff's competitors. *See* Paper 37 at 35 (referring to "the fact that IBM did supply the alternative suppliers with contact information for the employees").

As early as May 25, 2000, Charmaine Powers, an IBM administrative official involved with the Austin Project, forwarded via e-mail the contact information of the Austin Technicians to Bill Morrison of Cardinal. *See* Paper 37, Ex. 30.

Morrison informed Powers later that day that he had left messages for the employees, expressing his gratitude for her help and that "it's a pleasure to work with you!" *Id.*, Ex. 34. Within a week, Morrison had e-mailed the Austin Technicians, soliciting their resumes so that in the event they became "available for contract, we can set up contracts with you in very short order." *Id.*, Ex. 41.[10]

In sum, Defendant transmitted the employee contact information to Cardinal before the departure of the Austin Technicians from Plaintiff's employ and orchestrated the subsequent employment arrangements between the Austin Technicians and Cardinal in order to proceed with the Austin Project. Defendant has produced considerable evidence showing that the Austin Technicians had become angry and dissatisfied with Plaintiff, factors which Defendant maintains led to the employees' departures. However, given the prominent role it played in this situation, Defendant has failed to prove that, as a matter of law, it was not a proximate cause of the breach by

[10] Morrison also wrote in the e-mail that "[t]he procurement manager at IBM has requested that signed contracts not be solicited from individuals until they are 'free agents.'" *Id.* This statement also supports Plaintiff's contention that Defendant knew about the employment contracts between Plaintiff and the Austin Technicians, discussed *supra*.

the Austin Technicians. Thus, neither can Defendant prevail on summary judgment on this ground.

3. Damages

Plaintiff seeks recovery for, *inter alia*, "lost profits, other consequential damages, and harm to its reputation" on its tortious interference claim. Paper 1 at ¶ 73.[11] In its prior decision in this case, the court held that the limitation of liability clause in the Subcontract would not apply to the tortious interference claim if Defendant's alleged interference constituted "intentional wrongdoing" or "reckless indifference." *CompuSpa*, 228 F.Supp.2d at 627. The court also ruled that the clause was unenforceable if the tortious interference claim was a "separate, independent tort not covered by the forum selection clause." *Id.* Defendant contends that under either scenario, it is entitled to summary judgment because the claims for damages are speculative and unsupported by evidence. The court agrees.[12]

Both New York law and Texas law permit the recovery of a wide range of damages for a tortious interference with

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[11] The court previously had struck Plaintiff's demand for punitive damages. *See CompuSpa*, 228 F.Supp.2d at 627.

[12] The following analysis therefore will assume that Defendant's transmission of employee contact information to Plaintiff's competitors constituted "intentional wrongdoing" or, in the alternative, that the alleged tortious interference is a tort separate and apart from the Subcontract.

contractual relations claim. Under New York law, the plaintiff is "is entitled to damages in the amount of the full pecuniary loss of the benefits of the contract, and. . . the elements of damages, including consequential damages, are those recognized under the more liberal rules applicable to tort actions." *Int'l Minerals and Res., S.A. v. Pappas*, 96 F.3d 586, 597 (2d Cir. 1996) (internal quotations omitted). Similarly, under Texas law, a liable third party may be responsible for, *inter alia*, "emotional distress or actual harm to reputation, if those injuries are reasonably to be expected to result from the interference." *Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.*, 257 F.3d 449, 455 (5th Cir. 2001) (internal quotation omitted); *see also In re Performance Nutrition, Inc.*, 239 B.R. 93, 115 (Bankr.N.D.Tex. 1999) (recognizing consequential losses, emotional distress or actual harm to reputation, and lost profits). Indeed, "a claim for interference with contract is one in tort and damages are not based on contract rules." *Sulzer Carbomedics*, 257 F.3d at 456 (internal quotation omitted).

A claim for consequential damages in a tortious interference claim includes "recovery for lost profits, which must be proven with reasonable certainty." *Int'l Minerals and Res., S.A.*, 96 F.3d at 597. To that end, "at a minimum, opinions or estimates

of lost profits must be based on objective facts, figures or data from which the amount of lost profits may be ascertained." *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 213 (5th Cir. 1998) ("'Mere speculation' of the amount of lost profits is insufficient") (internal quotations omitted). Likewise, damages are recoverable for actual harm to reputation, if that harm is "reasonably expected to result from the interference." *Int'l Minerals and Res., S.A.*, 96 F.3d at 597 (quoting Restatement (Second) of Torts § 774A). The party seeking these damages, as Plaintiff here, bears the burden of satisfying these threshold requirements. *See Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1577-78 (2d Cir. 1994); *Hiller v. Mrfrs. Prod. Research Group of North America, Inc.*, 59 F.3d 1514, 1525 (5th Cir. 1995).

In the instant case, Plaintiff fails to produce any evidence or objective basis for the calculations to support these damages sought. Instead, in tabulating its purported lost profits, Plaintiff merely asserts that each of the Austin Technicians would have worked 4000 hours for approximately 23 additional months. *See* Paper 37, Ex. 68 (Plaintiff's Fourth Supplemental Interrogatory Answers). Plaintiff also points to the affidavit of Ainsley Gill, its President and CEO, in which he states, without any proper evidentiary support, that the alleged

interference by Defendant has "severely limited. . . CompuSpa's ability to procure additional contracts and business with other IBM business partners. . . . [and] has significantly impacted CompuSpa's reputation and good will and resulting ability to attract new employees." Paper 39, Ex. S at ¶¶ 8-9. Notably, Plaintiff did not obtain an expert witness for the calculation of damages; nor has it offered any sufficient evidence, expert or otherwise, to explain its damage computations.[13]

As with its breach of contract claim, Plaintiff has fallen short of the evidentiary showing necessary to raise a disputed issue of material fact. Where a party fails to demonstrate that it is entitled to recoverable damages, as required to maintain a claim for tortious interference with contractual relations, "[t]his deficiency presents an independent basis that compels dismissal" of the claim. *Net2Globe Int'l, Inc. v. Time Warner Telecom of New York*, 273 F.Supp.2d 436, 463 (S.D.N.Y.).[14]

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[13] In the scheduling order, the court set April 21, 2003, as the deadline for Plaintiff's disclosure of expert witnesses, pursuant to Rule 26(a)(2). *See* Paper 16. That deadline, of course, has long passed. Plaintiff had attempted to designate a damages expert witness after the deadline, and Defendant filed a motion to preclude that expert witness as untimely. *See* Paper 28. The court found Defendant's motion moot, upon Plaintiff's withdrawal of its expert witness disclosure. *See* Paper 31.

[14] The instant case is distinguishable from, *e.g.*, that of *Merlite Indus., Inc. v. Valassis Inserts, Inc.*, 12 F.3d 373 (2d Cir. 1993), in which the court found that on a claim for lost (continued...)

Accordingly, Defendant's motion for summary judgment as to the tortious interference with contractual relations claim will be granted.[15]

VI. Conclusion

For the foregoing reasons, the court will deny Plaintiff's motion for leave to file an amended complaint, will deny Defendant's motion for leave to file a surreply, and will grant Defendant's summary judgment motion. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

June 29, 2004

(...continued)
profits, the plaintiff presented a genuine issue of material fact, thereby precluding summary judgment, where it "offered statistical evidence of its past performance in a remarkably similar advertising program." *Id.* at 376.

[15] Because it has granted summary judgment for Defendant based on the damages issue, the court need not address Defendant's argument regarding the justification defense.